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No. 84-236

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOSEPH ALBERICI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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JOSEPH ALBERICI,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

The Government's Response to the Petition for Certiorari necessitates the following reply:

1. The Government makes two arguments in response to Petitioner's first contention. The first is that the principles established in *United States v. Helmecke v. Rice*, 281 F. 326 (S.D. Tex. 1922); *United States v. Wolfson*, 322, F. Supp. 798 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972); and *United States v. Sinclair*, 433 F. Supp. 1180 (D. Del.), *aff'd*, 566 F.2d 1171 (3d Cir. 1977) are limited to cases where there is no direct evidence that the document was "received" and the

prosecution seeks to prove "receipt" through evidence of office mailing practices. (Brief in Opposition, 5).[1] On this theory, the Government attempts to distinguish the present case, in which receipt was not an issue, from those cited above. Petitioner submits that those cases neither make nor turn on any such distinction, but are intended to apply to any mail fraud prosecution where use of the mails is sought to be established solely on the basis of business custom evidence.

The *Rice* decision, *supra*, was not limited to cases lacking direct proof of receipt. The Court stated that its ruling principle applied to all cases "where the fact (of mailing) is an important one." *Id.* at 331. The *Wolfson* Court later embraced the *Rice* precept and several years after that, the *Sinclair* court applied *Wolfson* in a mail fraud prosecution where the fact of mailing, not receipt, was in question.

The Government attempts to squeeze *Sinclair* into its theory by stating that in count two of that case, which was dismissed, the Opinion did not mention whether there was any evidence that the letter was received, whereas in count three, which was affirmed, there was "persuasive evidence of receipt." (Brief in Opposition, 5, n.4). The fact is, however,

1. The Government asks this Court to accept that testimony concerning office mailing customs six months prior to the period in question, along with a total failure to produce any evidence showing that the custom had not changed during this interval, is sufficient proof of mailing, because no one actually testified that things had changed. Petitioner submits that this is a sorry excuse for proof beyond a reasonable doubt, particularly where it is the only proof of mailing. It also implies an impermissible shifting of the burden of proof to the defendant. Furthermore, the Government's contention that Horowitz' use of the word "sends" reinforces the conclusion that the mails were used is wrong. The law is clear that no inference of mailing can be drawn from the word "send." *United States v. Hart*, 693 F.2d 286, 289 (3d Cir. 1982).

that the court never concerned itself with any receipt issue on either count. Count three was affirmed, not because there was "persuasive evidence of receipt," but because "The proof of mailing consisted of much more than a description by an executive of what he understood office practice to be." *Sinclair, supra,* at 1198. The Government's argument is plainly incorrect.

The second prong of the Government's Response (Brief in Opposition, 6-7) demonstrates that it has failed to grasp the crux of the first contention of the Petition for Certiorari and, based on that failure, argues that there is no conflict among the Circuits. It is not Petitioner's contention that office custom evidence, *per se,* is insufficient to establish use of the mails. Petitioner's contention is that when such evidence is the sole support of mailing, it must meet the standards discussed in *Wolfson* and *Sinclair, supra,* in order to be sufficient. On this point, there is certainly a conflict among the Circuits. (Pet. 6-15).

The language of the Fourth and Eighth Circuits in *United States v. Ellicott,* 366 F.2d 868 (4th Cir. 1964) and *United States v. Minkin,* 504 F.2d 350 (8th Cir. 1984), *cert. denied,* 420 U.S. 926 (1975), as discussed in the Petition, clearly reflects a position compatible with *Wolfson* and *Sinclair* and incompatible with *United States v. Joyce,* 499 F.2d (7th Cir.), *cert. denied,* 419 U.S. 1031 (1974) and its contemporaries. (See, Pet. 11-13). The cases cited by the Government to show otherwise are not on point.[2]

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2. In *United States v. Scott,* 730 F.2d 143 (4th Cir. 1984), the Fourth Circuit merely states that proof of mailing may be established by evidence of mailing practices. *Id.* at 147. However, that is not the issue in this case. The issue concerns what that proof must consist of when it is the only evidence of mailing. In *United States v. Scott,* 668 F.2d 384 (8th Cir. 1981), the witness himself regularly

2. In response to Petitioner's second contention, the Government argues that the failure of Petitioner's trial counsel to investigate the "Lynch" matter was a permissible tactical choice and not ineffective assistance of counsel. (Brief in Opposition, 7-9). In support of this argument, the Government cities trial counsel's unsuccessful attempt to contact Lynch and counsel's claim that he had been informed by the prosecutor that if the Lynch defense was asserted, Allen and DiTizio would testify that Petitioner had hired them to assault Lynch. (Brief in Opposition, 7-8).

The Government ignores the fact that Petitioner had also given trial counsel the name and number of a former Lynch employee, Richard Galli, who was ready and willing to assist in the investigation, and who would have testified that Lynch did indeed have a motive to set the fire. (Pet. 16-18). Counsel never attempted to contact Galli.

Counsel's decision that the Lynch defense would back-fire in court because of the prosecution's intention was premature, to say the least. Such a determination could not properly be made until after an investigation was completed, and its results analyzed and weighed carefully against the risks. Counsel's total failure to do this, approved by the Court of Appeals, clearly conflicted with the principles stated in the Third Circuit's holding of *United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982).

With respect to trial counsel's rejection of an accomplice charge, the Government contends that both courts below decided that counsel was not ineffective and this Court generally does not review such

NOTES *(Continued)*

picked up the letters in question at his post office box and was therefore directly involved in the mailing custom he testified about. *Id.* at 388. Such proof is consonate with Petitioner's view.

decisions. (Brief in Opposition, 8). In fact, the district court specifically declined to decide the issue (App. 5) and the decision of the Court of Appeals was of the most cursory fashion. The question thus stands in need of this Court's review.

The only direct evidence of Petitioner's involvement in this case came from DiTizio, an alleged accomplice, whose testimony was highly suspect. In these circumstances, courts uniformly hold that an accomplice instruction must be given if requested. *See*, e.g., *Tillery v. United States*, 411 F.2d 644, 648 (5th Cir. 1969). The district court offered to give the charge, and at the post-trail hearing stated, "I cannot . . . fashion for myself a persuasive reason why an accomplice charge wouldn't have been helpful to (Petitioner)." (App. 4, 5). The answer is that there was no persuasive reason.

Finally, Petitioner submits that he has satisfied the requirement of *Strickland v. Washington*, No. 82-1554 (May 14, 1984) that there be "a reasonable probability" that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 24. DiTizio's credibility was called into serious question on cross-examination and by the contrasting testimony of his cohorts. There was at least a reasonable probability that an accomplice instruction would have finally tipped the scales against him. This, together with the Lynch defense, would very likely have changed the outcome of the trial.

3. The Government argues that the district court's instructions, which focused only on "deposit" and not on "delivery," were not a constructive amendment of the indictment because there is "no material difference between placing a letter in the mail and its delivery by mail," and therefore, "there was no

possibility that the petite jury convicted on the basis of an allegation never made by the grand jury." (Brief in Opposition, 11-12).

This is precisely the argument made to and rejected by the district court. (App. A, 7-8). That court specifically found that there is a significant difference between these terms, that they constitute separate offenses under the statute, and that they are integral parts of the indictment. (App. A).[3] The court then found that its instruction seriously altered this ingredient of the offense charged in the indictment. In other words, there was a constructive amendment.

When the district court reinstated count five, it did not alter this finding. It reinstated count five because it felt that *even though* there was a constructive amendment, it was "harmless error." (App. A, 22, 24).[4] Petitioner submits that there is no such thing as a harmless constructive amendment.

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3. Other courts have held the same: *United States v. Klingbeil*, 410 F. Supp. 1235 (W.D. Wis. 1976); *United States v. Richman*, 369 F.2d 465 (7th Cir. 1966). The close relation of these terms to a single transaction only magnifies the court's duty to keep them distinct. As the Government points out, the district court did not instruct the jury that delivery could be presumed from deposit, and thus, failed to bridge the gap.

4. Petitioner submits that the strength or weakness of the evidence on count five has no bearing on the question of whether there was a constructive amendment of the indictment. That question entails an examination of two factors; the indictment and the instructions. The force of evidence relates only to the separate "harmless error" question, and this Court should not allow the Government or the Court of Appeals to confuse the two. An examination of the charges in the indictment and the court's instructions in this case, demonstrates that the district court focused on deposit, and not on delivery. The cases state that these are different offenses. (Pet. 23). The magnitude of the error is therefore obvious.

The failure of the trial counsel to object to the fatal instructions was irrelevant, because a constructive amendment is prejudicial *per se* and thus plain error. It has been held that plain error is that which causes a substantial miscarriage of justice. *United States v. Lemire*, 720 F.2d 1327, 1343 n. 25, (D.C. Cir. 1982), *cert. denied*, No. 83-1413 (June 4, 1984). The error herein violated Petitioner's fundamental right to be tried only on criminal charges brought by a grand jury. As a result of the district court's instructions, Petitioner was forced to answer for a crime he was not charged with. It is hard to imagine a more substantial miscarriage of justice. This Court in *Stirone v. United States*, 361 U.S. 212 (1960), has held that "Deprivation of such a basic right is far too serious to be dismissed as harmless error." *Id.* at 217.

Thus, according to *Stirone*, a constructive amendment is never harmless, but always prejudicial. Any possibility of harmless error is therefore automatically foreclosed by the finding of a constructive amendment. To the extent that the courts below and the Government assert to the contrary, they are in fatal conflict with *Stirone*.

4. The Government's response to Petitioner's fourth contention is that the portion of the prosecution's speech objected to by Petitioner (quoted at Pet. 25) did not amount to a suggestion that the guilty pleas of the prosecution's witnesses were evidence of Petitioner's guilt, because no direct reference was made to the guilty pleas. (Brief in Opposition, 13). Petitioner submits that while the words "guilty plea" were not used, the reference was unmistakable.

A realistic review of the closing argument demonstrates that the prosecution was not trying to do Petitioner any favors when it made the speech in

question. It was trying to secure a conviction. The clear import of the prosecution's words was that if its witnesses had committed the predicate offense (arson), then there was fraud. (Pet. 25). It takes no great effort to realize that what this meant was that the witnesses had actually pleaded guilty to the predicate offense and therefore, Petitioner must have committed the fraud.

The failure of the district court to give a cautionary instruction on such comment was plain error even by the Government's proposed standard. (Brief in Opposition, 13). Aggravating circumstances such as trial counsel's inexcusable failure to pursue the "Lynch" matter, which would have indicated that Lynch set the fire, counsel's refusal of an accomplice instruction, which would have warned the jury to regard the witnesses' testimony with suspicion, and the district court's failure to give the correct instructions on the "delivery" element of mail fraud, combined to raise the failure to give a cautionary instruction to the level of plain error.

5. The Government's response to Petitioner's final contention is simply that correspondence between insurance adjusters regarding an underlying fraudulent claim is related to the insurance fraud. (Brief in Opposition, 7, at n.7). This general statement completely ignores the circumstances of the case at bar as discussed in the Petition.

The subject matter of the letter underlying the conviction in this case involves nothing more than a squabble between two insurance Adjusters over what was damaged in the fire. It did not concern the nature of the fire, or its origin, which were factors related to the alleged scheme to defraud. The proofs of loss were not submitted to Curley Adjustment Company. Furthermore, the correspondence occurred at

a time when one of the companies (Curley) had ceased to represent its client (Safeguard) and Petitioner had lost his right to collect. (Pet. 28, 29).

Under those circumstances, the letter could not have played a "significant part" in enabling Petitioner to collect insurance proceeds as required by this Court in *United States v. Maze,* 414 U.S. 395 (1974), and the decision of the Third Circuit thus conflicts with the spirit of the *Maze* Opinion.

CONCLUSION

For the reasons advanced in the main brief, as extended by this Reply Brief, Petitioner's conviction and sentence should be reversed.

November, 1984

Respectfully submitted,

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